National Telephone Services, Inc. *and* Communications Workers of America and its Local 9404, AFL–CIO. Cases 32–CA–10515, 32–CA–10623, 32–CA–10676, 32–CA–10723, and 32–RC–3056

January 4, 1991

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On May 25, 1990, Administrative Law Judge James M. Kennedy issued the attached decision. The Charging Party filed exceptions and a supporting brief and the Respondent filed an answering brief in support of the judge's decision.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to approve the settlement agreement of the Respondent.[2]

ORDER

The National Labor Relations Board approves the settlement agreement of the Respondent and orders that the Respondent, National Telephone Services, Inc., Hayward, California, its officers, agents, successors, and assigns, shall take the action set forth therein.

IT IS FURTHER ORDERED that the election in Case 32–RC–3056 is set aside, and that the case is remanded to the Regional Director for Region 32 to conduct at the place the previous election was held a new election at the earliest time he deems the circumstances will permit the free choice of a bargaining representative.

[Direction of Second Election omitted from publication.]

[1] In a letter dated July 9, 1990, transmitting a copy of her brief to the administrative law judge to the Board, counsel for the General Counsel advised the Board that she has no objection to the settlement agreement approved by the judge for resolving the unfair labor practice cases or to his recommendation on the objections in the representation case.

[2] In adopting the judge's recommendation to accept the settlement agreement presented unilaterally by the Respondent, we note, as he did, that it settles all the allegations of the complaint by providing for the appropriate remedies, including notice posting, and that the Respondent has not been shown to be a recidivist violator of the Act. As to the Charging Party's contention that the agreement limits the Regional Director's discretion concerning the timing for the rerun election, we find that, in the circumstances here, the election could not have been held before the October date set forth in the agreement. Such circumstances include not only the customary 60-day notice posting period but the time that has elapsed seeking Board review.

Elaine D. Climpson, for the General Counsel.

Michael F. Marino and *Lee Carol Johnson Esq. (Reed, Smith, Shaw & McClay)*, of Washington, D.C., for the Respondent.

David Borgen, of Burlingame, California, for the Charging Party.

NOTICE OF APPROVAL OF INFORMAL SETTLEMENT AGREEMENT AND REPORT ON OBJECTIONS

JAMES M. KENNEDY, Administrative Law Judge. This case was opened for hearing before me in Oakland, California, on April 23–24, 1990, on a consolidated complaint issued by the Regional Director for Region 32 of the National Labor Relations Board on December 29, 1989. It is based on charges originally filed by Communications Workers of America and its Local 9404, AFL–CIO (the Union or the Charging Party) on August 10, October 3 and 26, and November 14, 1989, respectively; some of those charges were subsequently amended. The complaint alleges that National Telephone Services, Inc.,[1] (Respondent) has committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act. Also consolidated for hearing are certain objections to the representation election in Case 32–RC–3056, which by an order of the Regional Director require me to issue a report on objections.

The Posture of the Case

Prior to going on the record in this case, I conducted a settlement conference. The conference was unsuccessful but did permit the parties to explore their areas of agreement and disagreement. Upon opening the record, Respondent orally presented a settlement proposal which would purportedly settle the entire unfair labor practice case and which would have set the rerun election for a date no earlier than October 5–6, 1990. The Charging Party objected to my considering the matter as the terms were not then concrete. I thereupon directed Respondent to reduce its proposal to writing and adjourned the hearing to the next day so that could be accomplished.

On the following day, Respondent presented me with Respondent Exhibit 1,[2] a proposed settlement which was typed on a standard NLRB informal settlement form providing for approval by the administrative law judge, together with an official NLRB notice to employees, moving that I approve it. As part of the proposal, Respondent included a stipulation on objections in which it agreed to a rerun election no earlier than October 1, 1990, or as soon as possible thereafter. Although on their face they do not appear to be contingent on one another, Respondent on the record clearly stated that they were. Therefore, they must be considered together, not separately. Counsel for the General Counsel advised that the undertakings set forth in Respondent's proposed informal settlement would fully remedy the unfair labor practices alleged in the complaint. The Charging Party did not disagree, but nevertheless opposed the motion. Counsel for the General Counsel stated that she did not oppose the settlement agree-

[1] Respondent's name appears as corrected at the hearing.

[2] A review of the transcript appears to show that R. Exhs 1 and 2 were not admitted. That oversight is corrected and both exhibits are received. To avoid confusion, the three-page stipulation on objections is re-marked as R. Exh. 1(a) and the two-page document, the informal settlement agreement with the attached notice to employees, is re-marked as R. Exh. 1(b).

ment, but was unable to join it because the date of the rerun election was too distant. She asserted that the election should be promptly held upon the completion of the 60-day posting period, then targeted for early August 1990. Substantively, however, she had no objection to the proposal.

The Charging Party opposed it in its entirety. It agreed with the General Counsel that the new election date was too distant. It also objected to the fact that it contains a nonadmission clause. It wishes to characterize Respondent as a chronic violator of the Act, not entitled to such a clause. In support of that argument it points to the instant complaint, to a case settled in Region 5 in May 1989, but which the charging local union later withdrew, and to new charges currently pending in Region 5 in which, at least as of this hearing date, there had been no determination of merit. It also demanded that Respondent sign a formal settlement providing for the entry of a Board order and court judgment.

The Charging Party further objected to the proposal on procedural grounds, arguing that there is no ''agreement,'' that approving the settlement ''dictates'' settlement terms to a party, and that the administrative law judge has no authority to set election dates.

Because of the unusual nature of the procedure proposed, and because of the General Counsel's somewhat equivocal stance as well as the Charging Party's opposition, I concluded that it would be best to take the matter under advisement. To that end I allowed the parties time to file memoranda of points and authorities in support of their respective positions. The Charging Party filed a memorandum in opposition to the motion; Respondent filed a memorandum in support; the General Counsel filed a well-written and insightful memorandum detailing my authority to deal with the issue. All of them have been carefully considered.

Factual Background

This matter is one which pits the application of common sense and practicality against what can fairly be considered one party's desire to be vindicated by hearing of its perceived loss of statutory rights. When the complaint was issued, the Charging Party believed that its charges were meritorious and that the Board would issue an appropriate remedial order, set the election aside, and rerun it after an appropriate remedial period and posting of a notice. This process, if litigated to conclusion, would take at least a year before the Board, and if appealed to the courts, perhaps 2 or 3 years. Assuming a complete litigation success by the General Counsel and the Charging Party, such litigation would have resulted in a finding that Respondent had violated the Act, the 1989 election would have been set aside and a new election scheduled, probably for sometime in 1992. Of course, as in any litigation, success, whether complete or not, cannot be guaranteed. Nor can it be assumed. Moreover, litigation has its expenses, not just those of the private litigants, but also for the taxpayer. If the law can be enforced without spending money in litigation, that savings benefits everyone.

Moreover, the Act is remedial in its purposes. It is designed to allow employees the right to exercise their Section 7 rights in a reasonably prompt fashion and in an atmosphere free of restraint and coercion. When that end can be accomplished without resort to any, much less lengthy, litigation, that path is the preferred one. Because it is often negotiated a path, one which has both educational and nonculpable features, it is usually favored by the parties and the Board; acceptance of the policies of the Act without litigation is clearly in the public interest. *Farmers Cooperative Gin Assn*., 168 NLRB 367 (1967). Election concerns, however, can complicate the situation.

In election cases, the Board must be careful to see that employee voting rights are exercised without the atmospheric influence of unfair labor practices or other election misconduct. At the same time, if such misconduct is believed to have occurred, the Board must remedy the situation as quickly as it can so those rights may promptly be exercised free of such contaminants. Its duty to perform this task is independent of the rights of the private parties, for the Board in such situations acts in the public interest. Thus the concerns of the parties, while to be given due consideration, are not controlling.

In that context, the following facts are relatively undisputed. Respondent is a Delaware corporation which provides national, i.e., long-distance, telephone services and meets the Board's jurisdictional standards. On July 5, 1989, the Union filed a petition for a representation election. On August 8, 1989, the Regional Director approved a Stipulated Election Agreement. That agreement provided for an election on September 29 and 30, 1989, among the employees in the following unit:

> All full-time and regular part-time operators, team leaders, office assistants, receptionist, customer relations representatives, switch technicians and field technicians employed by [Respondent] at its Hayward, California facility, and including customer relations representatives, field technicians and switch technicians employed by [Respondent] at its Denver, Colorado, Los Angeles, California, Las Vegas, Nevada, and Phoenix, Arizona facilities; excluding professional employees, guards and supervisors as defined in the Act.

An election was conducted on the above dates. Of approximately 125 eligible voters, 43 voted for representation by the Union while 64 voted against. There were no void ballots and the nine challenged ballots were insufficient to affect the outcome of the election. The Union responded to this result by timely filing objections to the outcome of the election and by filing the instant unfair labor practice charges. The Regional Director on January 3, 1990, issued his report and recommendation on objections. In it he noted that the objections, for the most part, tracked the allegations of the complaint and ordered the matter consolidated with the complaint for a hearing. On April 13, 1990, he issued an amended report having a similar recommendation. On that basis the administrative law judge assigned to the case is obligated to make a report to the Board recommending the appropriate manner to process the election case. Should the election be set aside, and if so, on what basis?

At the outset of the hearing, without admitting that it had engaged in the unfair labor practices alleged and without conceding that it had committed any conduct which would affect the outcome of the September 1989 election, Respondent signed an informal Board settlement proposal which, the General Counsel agrees, fully remedies the unfair labor practices set forth in the consolidated complaint. Not only does it provide for remedial orders with respect to conduct, it pro-

vides a make-whole remedy for three named employees who suffered allegedly discriminatory pay losses. Respondent also stipulated, in conjunction with the settlement proposal, to set aside the 1989 election so long as the rerun election is not held before October 1, 1990.

Analysis

Respondent's proposal is very attractive, but not without its drawbacks. The most obvious is the fact that neither the General Counsel nor the Charging Party have accepted it. Indeed, the Charging Party has clearly rejected it. Yet, it is clear that the General Counsel's objections are minimal and he has tacitly, if not expressly, accepted it. As his representative stated on the record, ''[O]ur principal problem is with the delay of the election . . . But, from a practical standpoint, we recognize that if we try this case and file briefs and go along that procedure, and we win and we get the election set aside, that we are talking about not having an election until the minimum of a year from now . . . [B]eing pragmatic, and recognizing the realities of that, . . . we can't recommend the settlement, but we won't oppose it.''

Yet that drawback does not appear insurmountable. Nothing in the Board's Rules prohibits the administrative law judge from taking such a settlement, although as both the General Counsel and the Charging Party point out, Section 101.9(d)(1) might be read as requiring at least two of the opposing parties to agree.[3] Nonetheless, counsel for the General Counsel does not so read that language. Even so, the Section 101 Rules are only descriptive of the Board's procedures; they are not binding. The Rules set forth in Section 102 are the ones which have binding effect. But even the Section 101 language is too vague to cover the situation here. Accordingly, like the General Counsel, I do not find that language to be controlling.

Obviously, if the General Counsel had specifically agreed with Respondent, or if the Charging Party had agreed with Respondent, there would be a better guaranty that Respondent's undertakings would in fact be carried out. Yet, the General Counsel's decision not to join the settlement does not mean that the Regional Office will not oversee compliance. Obviously it will. Insofar as the Regional Director is concerned, this settlement differs little from an imposed order. In such situations a respondent has even less incentive to comply than here. The Regional Office clearly pursues compliance in those cases. I have every confidence that they will do so here as well, for the Regional Director is the Board's representative in compliance matters. Thus, the lack of an actual ''agreement'' is of little moment insofar as the public interest is concerned. If Respondent takes the steps it promises to take, the alleged unfair labor practices will be fully remedied and the atmosphere will be cleansed. If that occurs the Charging Party can have no real complaint and any subsequent election will be fair.[4] In any event, this settlement may fairly be characterized as an agreement between Respondent and the Board.

That takes me to the second apparent drawback, the timing of the second election. The stipulated election agreement provides that all procedures after the ballots are counted shall conform to the Board's Rules and Regulations. Postelection procedures are set forth in Board Rule 102.69, specifically subsection (f). That Rule, in essence, says that the Board itself is ultimately to rule on the merits of the objections and to decide what action is appropriate to take. The administrative law judge, in a consolidated case such as this, sits as the Board's representative and has the authority to recommend what action the Board should take. His recommendations are subject to the review process and the Board is free to adopt, reject, or modify whatever recommendation he makes. That simply means it is the Board which will make the final decision. Its decision may include an order setting aside the objected-to election and ordering a rerun.

Thus, the Charging Party's opposition to the motion insofar as it contends the judge has no authority to set a rerun election is not a correct analysis. The judge, when issuing his report, simply makes a recommendation. He does not issue the order himself; that power is reserved to the Board. In this case, Respondent's stipulation does not totally limit the Board's discretion regarding when to set the election. The only limit is that the election may not be run before October 1, a date it could not possibly have met had litigation taken its course. After that date, the Board's discretion (usually delegated to the Regional Director for discussion with the parties) is unfettered. Compare *Coca-Cola Co*., 266 NLRB 165 (1983).

Given that analysis, as well as applying the pragmatic considerations cited above, the drawbacks are either insignificant or nonexistent. Indeed, *Coca-Cola*, has many similarties to this case. As here, a motion was made asking the judge to approve a Board informal settlement agreement on a unilateral basis; moreover, the charging party and respondent had agreed to a new election, but at a time which the Regional Director would not adopt. As in this case, litigation would have postponed the rerun election, if any, for several years. The judge approved the settlement over the Regional Director's objection, essentially taking the same pratical approach I take here. The principal difference between *Coca-Cola* and

[3] Sec. 101.9(d)(1) reads as follows:

> If the settlement occurs after the opening of the hearing and before the issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

[4] The Charging Party argues, based on language found in *Chemical Workers Local 1-591 (Snelson, Inc.)*, 208 NLRB 296 (1974), and *Gimbel Bros*., 100 NLRB 870 (1952), that my, and therefore, the Board's, power to settle cases is extremely limited. *Gimbel* is readily distinguishable. There, respondent union complained that the General Counsel had not given it an opportunity to settle the case, asserting such an omission was contrary to the Administrative Procedure Act. The Board found proof on the issue wanting. The trial examiner's language, found at 887, to the effect that the Board has only a limited power of review and cannot originate or dictate settlement terms, refers to only its authority over the General Counsel, nothing more. Similarly, in *Chemical Workers*, the administrative law judge's language referred to the General Counsel's refusal to accept a nonadmission clause in a case involving multiple incidents of strike violence. He, too, declined to review the General Counsel's discretion to refuse its inclusion. Neither of these cases addressed the issue presented here, whether the Board has the authority to accept a respondent's commitment to remedy all of the unfair labor practices alleged and to refrain from future violations, where it has used standard Board forms and where the General Counsel has acknowledged that the proposal effectuates the policies of the Act. Thus I do not find the Charging Party's cases persuasive; their language has no contextual relevance here.

instant case is that in that case there was an agreement between two of the three litigants. Although that is not the case here, that issue has been dealt with above.

The only other point raised by the Charging Party in its written opposition is the propriety of the nonadmission language which Respondent has insisted on. I have discussed the facts above, noting that the Charging Party contends Respondent is a chronic wrongdoer. Based on the evidence which the Charging Party has presented, however, I am unable to concur. The only previous time Respondent has been before the Board, it signed a settlement agreement only to have the charging union withdraw the charge. Whatever the underlying merits may have been, I am unable to consider that case as evidence that Respondent had ever violated the Act. Certainly neither the instant charges, nor unresolved charges pending in another Region, can be used to support the claim. Accordingly, Respondent concern here is without viable support. I believe it is a proper exercise of discretion to accept this agreement with the inclusion of the nonadmission language. See *Mine Workers (Decker Coal)*, 294 NLRB 162 (1989). Nor is this an 11th hour settlement proposal coming after trial and against a history of wrongdoing. Compare *Teamsters Local 115 (Gross Metal Products)*, 275 NLRB 1547 (1985).

The Board recently discussed the importance of settlements in *Independent Stave Co*., 287 NLRB 740 (1987). Although purporting to deal with private, non-Board settlements, the case set forth some principles which are applicable here. It said that before approving a purported settlement, it would examine four factors: 1. whether the parties have agreed to be bound and what position the General Counsel has taken in regard to the settlement; 2. whether the settlement is reasonable in light of the allegations of the complaint against the risk inherent in litigation; 3. whether there has been any fraud, coercion, or duress by any party in reaching the settlement; and 4. whether the respondent had a history of violations or has breached past settlement agreements.

In this case Respondent has offered the settlement agreement and has promised to abide by its terms: it seems ''bound'' within the meaning of *Independent Stave*. The General Counsel does not oppose its terms and has acknowledged that it effectuates the Act. Only the Charging Party actively opposes the agreement. The risk of litigation include not only the risk of losing, but the loss of time in litigation. Many cases have been lost by delay. The aphorism: ''Justice delayed is justice denied,'' has a particularly strong application here. Finally, there is no contention that the settlement is fraudulent, and the Charging Party's claim that Respondent has a history of wrongdoing and breaching settlement agreements has been previously disposed of. Thus, on analyzing the factors set forth in *Independent Stave*, and applying them to the facts of this case, there appear to be no impediments to my approving the settlement.

Accordingly, the parties are advised that I have today approved the document entitled ''Settlement Agreement'' which was signed by Repondent's attorney Michael F. Marino on April 24, 1990. Under separate cover I am transmitting it to the Regional Director for Region 32 for distribution to the parties in the usual way and for supervision of compliance. On compliance therewith, the Regional Director will so advise me in writing and I shall direct that the unfair labor practice cases be closed.

Recommendation Regarding the Election in Case 32–RC–3056

Based on Respondent's stipulation on objections dated April 24, 1990, I recommend that the Board set aside the election of September 29–30, 1989, in Case 32–RC–3056 and schedule a new election on or after October 1, 1990, so long as there has been compliance with the settlement agreement in Cases 32–CA–10515, 32–CA–10623, 32–CA–10676, and 32–CA–10723.[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.